SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCR 2016 0225

AUNG PUN — Applicant

v

THE QUEEN — Respondent

JUDGES:	REDLICH and McLEISH JJA and CROUCHER AJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	17 May 2017
DATE OF JUDGMENT:	30 August 2017
MEDIUM NEUTRAL CITATION:	[2017] VSCA 219
JUDGMENT APPEALED FROM:	[2016] VCC 1458 (Judge Lawson)

CRIMINAL LAW – Appeal – Sentence – Pleas of guilty – Obtain financial advantage by deception and negligently deal with proceeds of crime – Sentence of five years' imprisonment – Applicant sentenced on charges of negligently dealing with proceeds of crime as though for knowingly and dishonestly doing so – Role of judge when faced with conflict between agreed facts and negotiated charges – Whether sentence manifestly excessive – Appeal allowed – Applicant resentenced – *R v De Simoni* (1981) 147 CLR 383; *R v Brown* (1989) 17 NSWLR 472; *R v Newman* [1997] 1 VR 146 discussed – *Crimes Act 1958* ss 81, 82, 193, 194, 195 and 321M; *Drugs, Poisons and Controlled Substances Act 1981* ss 70, 71AC and 73.

APPEARANCES:	Counsel	Solicitors
For the Applicant	Mr A Chernok	Valos Black & Associates
For the Crown	Ms S Flynn	Mr J Cain, Solicitor for Public Prosecutions

REDLICH JA
McLEISH JA:

1 We have had the considerable advantage of reading in draft the reasons for judgment of Croucher AJA. We agree, for the reasons his Honour gives, that the applicant was erroneously sentenced on the eight charges of negligently dealing in the proceeds of crime ('NDPC') as though they involved an element that he knew the funds he withdrew were the proceeds of crime. We agree that the applicant should be resentenced as his Honour proposes.

2 The sentencing judge was placed in an invidious position for two reasons. Firstly, the elements on the charge of obtaining a financial advantage by deception ('OFAD') (charge 6—the applicant opened a bank account in the false name of 'Phuong Trinh') differed logically from the mens rea on the charges of NDPC with respect to the same account, which alleged only that he was negligent as to whether the funds he withdrew were the proceeds of crime (charges 9 and 10). Secondly, the plea was conducted on the basis that the facts, as placed before her Honour, had been settled between the parties and were agreed. One fact was that, on all eight NDPC charges, the applicant knew that the accounts from which he withdrew monies, including those he had not personally opened, were accounts in false names. It was said on the applicant's plea that he knew all of the accounts were false and that he acted dishonestly in withdrawing funds from those accounts. Therefore he knew they were the proceeds of crime. His counsel made no reference to the fact that the charges involved only negligence as to whether he knew the funds were the proceeds of crime.

3 It is thus not surprising, as Croucher AJA explains, that her Honour mistakenly sentenced the applicant on the admitted basis that the applicant knew that the funds he withdrew were the proceeds of crime, and so was sentenced for a more serious offence than that charged, in breach of the rule in *R v De Simoni*.[1]

[1] (1981) 147 CLR 383 ('*De Simoni*'). See also *Evidence Act 2008* s 191(2)(b).

4 The sentencing judge was told that the charges on the indictment were settled, following a committal, as a result of what the prosecutor described as a 'lengthy plea bargaining process'. The inconsistency between charges 6 and 9 and 10, and the conflict between the facts placed before her Honour and the NDPC charges, came about because of that negotiated outcome. Plea bargaining is peculiar to our adversarial system, unregulated by statute and wholly dependent upon prosecutorial discretion.[2] While the *Public Prosecutions Act 1994* and *Victims' Charter Act 2006* do touch on the process, they neither define nor address it in any detailed or systematic fashion.[3] A negotiated outcome may, and often does, result in a plea to a less serious offence than could be established by the facts available to the prosecution.

5 The Director of Public Prosecutions' *Policy on Resolution* states that, 'in all cases, the resolution of a prosecution by a plea of guilty to lesser charges *may only be approved if the lesser charges are appropriate charges*.'[4] 'Appropriate charges' are defined as those that 'adequately reflect the accused's criminality, based on what can be proved beyond reasonable doubt', and which would 'allow for the imposition of a sentence which adequately reflects the accused's criminality.'[5]

6 As it was not challenged that the applicant knew that all of the accounts were false, the NDPC charges reflected a less serious form of the applicant's criminality. We do not need to consider whether the lesser charges were 'appropriate' as it is a matter

2 See Robert D Seifman and Arie Freiberg, 'Plea Bargaining in Victoria: The Role of Counsel' (2001) 25 *Criminal Law Journal* 64.

3 Section 24(b) of the *Public Prosecutions Act 1994* provides that the Director must have regard to 'the need to conduct prosecutions in an effective, economic and efficient manner.' Section 9 of the *Victims' Charter Act 2006* provides that victims must be informed of any modification to charges.

4 Director of Public Prosecutions 'Policy on Resolution' (Policy No 22, Office of Public Prosecutions, 2014) [13] (emphasis added). This document has very recently been superseded by the new *Policy of the Director of Public Prosecutions for Victoria* (10 August 2017). Chapter 4, titled 'Resolution', sets out the framework for negotiated pleas. Relevantly, in 3(e), it reiterates the language used in the old policy: the charges must 'adequately reflect the accused's criminality', 'allow for the imposition of an appropriate sentence' and 'allow for the making of all appropriate ancillary orders': 20.

5 Director of Public Prosecutions 'Policy on Resolution' (Policy No 22, Office of Public Prosecutions, 2014) [3].

exclusively for the Director what charges should be preferred. His decisions in that regard are not susceptible to judicial review. This is not to say that it is proper for an indictment to contain charges that are logically inconsistent. The applicant acknowledged by his plea of guilty to charge 6 that he created the false 'Phuong Trinh' account. It was therefore not possible for him to be negligent as to the nature of the funds withdrawn from that account. The sentencing judge should not have been asked to sentence upon charges that were logically inconsistent.

7 A court is not powerless to deal with such an issue but there are considerable constraints within which the sentencing judge must work. These were stated by Gibbs CJ (with whom Mason and Murphy JJ agreed) in *De Simoni* and have since been consistently applied:

> At first sight it may seem unlikely that the framers of the [*Criminal Code* (WA)] intended that an offender should be sentenced on the fictitious basis that no circumstance of aggravation existed when it is found by the trial judge that such a circumstance did exist, particularly when such a finding is based upon an unchallenged statement of facts made by the prosecutor after the offender has pleaded guilty. However, the general principle that the sentence imposed on an offender should take account of all the circumstances of the offence is subject to a more fundamental and important principle, that no one should be punished for an offence of which he has not been convicted. Section 582 reflects this principle. The combined effect of the two principles, so far as it is relevant for present purposes, is that a judge, in imposing sentence, is entitled to consider all the conduct of the accused, including that which would aggravate the offence, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence.
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> [A] judge, in imposing sentence, may not have regard to a circumstance of aggravation which should have been charged in the indictment if it was intended that reliance should be placed upon it. He may, of course, have regard to facts which might ordinarily be described as circumstances of aggravation, but which do not fall within the definition of that expression in the [*Criminal Code* (WA)], because they do not render the offender liable to a greater punishment.
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> It is not only in cases in which the offence has been accompanied by circumstances of aggravation that a trial judge may be required, in sentencing, to take an artificially restricted view of the facts. This will be so also in cases where the jury's verdict is inconsistent with the view of the facts that the judge himself has formed, for the judge cannot act on a view of the facts which conflicts with the jury's verdict. However, where the Crown has charged the offender with, or has accepted a plea of guilty to, an offence less

> serious than the facts warrant, it cannot rely, or ask the judge to rely, on the facts that would have rendered the offender liable to a more serious penalty.[6]

8 That exposition must be contrasted with the dissenting observations of Brennan J (with whom Wilson J agreed) who said:

> If in cases where the facts are agreed, artificiality were to conceal or distort the true circumstances of the offender's conduct, the administration of criminal justice would be at risk. Unless statute clearly compels the adoption of artificiality in sentencing it should be avoided, for it distorts the weighing of the factors material to the exercise of a sound discretion. Sentencing evokes much judicial anxiety and rightly so; and it would not be in the public interest (nor oftentimes in the interests of an offender) to make the task of sentencing more difficult by requiring the judge to leave out of account the uncontested circumstances of the case before him.[7]

9 The judge in the present case could not exercise control over the NDPC charges selected by the Director unless it was necessary to do so to prevent an abuse of process or to ensure a fair process. In *R v McCready*[8] Young CJ said:

> [I]t is I think clear that it is for the Crown to decide upon what offences an accused person is brought to trial by way of presentment or indictment, and, although the Court unquestionably has power to prevent an abuse of its process, it is not for the Court to decide, speaking generally, upon what offence the Crown should proceed. There are, of course, many statements in the books by judges and courts of the highest standing that it is undesirable to join charges of conspiracy with charges of substantive offences, that the charge of conspiracy should be sparingly employed, that at times a charge of conspiracy by reason of the evidence admissible to prove it may put an accused person at a considerable disadvantage. But all those observations stop short of denying to the Crown the right to indict or present for trial upon such charge as the Crown thinks fit.[9]

10 In *R v Brown*[10] the NSW Court of Criminal Appeal (Gleeson CJ, Newman and Loveday JJ) said:

> There may be circumstances in which it is appropriate to characterise a decision by the prosecuting authorities to charge a person with one offence, to which he is prepared to plead guilty, rather than another and more serious offence which he has apparently committed, as an abuse of the process of the court. We do not accept that the Director of Public Prosecutions has an absolute and uncontrolled discretion which empowers him to charge an

6 (1981) 147 CLR 383, 389, 392.

7 Ibid 407.

8 (1985) 20 A Crim R 32.

9 Ibid 39.

10 (1989) 17 NSWLR 472 ('*Brown*').

> accused person in whatever way he pleases, regardless of the gravity of the conduct of the accused, and then to require the court to give effect to his decision in that regard. There are substantial practical limitations upon the power of courts to control the exercise by prosecuting authorities of the wide discretion which they undoubtedly enjoy, and in practice the most important sanctions in this regard are likely to be political rather than legal. Nevertheless, in an appropriate case a court, paying due regard to the prosecuting authority's rights in relation to the formulation of charges, may need to give effect to its own right to prevent an abuse of its process.
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> We would add that nobody suggested in *R v De Simoni* that what was there involved was an abuse of the process of the Court. Indeed, Wilson J (at 399) referred to the fact that the omission from the indictment in that case of the relevant additional circumstance of aggravation was apparently deliberately made in order to procure the result that the trial of the charge could be held in the District Court instead of the Supreme Court. His Honour dismissed that consideration with the comment: '…There are many discretions committed to the Crown in the administration of criminal justice.'[11]

11 The Court added:

> [A]lthough the discretion of the prosecuting authorities in this regard is not absolute and unfettered in the sense that the court is powerless to intervene, the discretion is very wide and in its exercise the authorities are entitled to take account of practical considerations including matters relating to the availability of resources. To describe a bona fide decision by the Director of Public Prosecutions as an abuse of process of the court is no light matter, and courts should pay due regard to the consideration that it is the executive which is entrusted with the primary responsibility of making decisions of this character.[12]

12 In *Maxwell v The Queen*[13] Dawson and McHugh JJ stated that only in extreme and rare circumstances would a sentencing court find that the decision by the prosecuting authority as to what charge to proceed with had led to an abuse of process. After referring to *Brown* their Honours said:

[11] Ibid 479–81.

[12] Ibid 481. We note in passing that in *Brown* the Court stated that the rubric of abuse of process is not the only one under which these sorts of issues (especially where a judge feels impossibly constrained by *De Simoni* principles) may be considered: at 481.

[13] (1996) 184 CLR 501.

> A mere difference of opinion between the court and the prosecuting authority could never give rise to an abuse of process. No doubt a court may, if it thinks desirable to do so, express its view upon the appropriateness of a charge or the acceptance of a plea and no doubt its view will be accorded great weight. But if a court does express such a view, it should recognise that in doing so it is doing no more than attempting to influence the exercise of a discretion which is not any part of its own function and that it may be speaking in ignorance of matters which have properly motivated the decision of a prosecuting authority. The court's power to prevent an abuse of its process is a different matter and the question of its exercise could only arise in this context if the prosecuting authority were seen to be acting in an irresponsible manner. That, as experience happily tells, is seldom, if ever, likely to occur.[14]

13 Gaudron and Gummow JJ agreed with Dawson and McHugh JJ but approached the question of abuse of process somewhat differently. Relevantly their Honours said:

> It follows from the nature of a criminal trial, in which the prosecution bears the onus of proving guilt beyond reasonable doubt, that it cannot be an abuse of process to proceed on a lesser charge, whether by acceptance of a plea under s 394A of the [*Crimes Act 1900* (NSW)] or otherwise, merely because there is evidence which, if accepted, would sustain a conviction for a more serious offence.[15]

14 Subsequently, in *Director of Public Prosecutions (SA) v B*,[16] Gaudron, Gummow and Hayne JJ said:

> The line between, on the one hand, the decisions whether to institute or continue criminal proceedings (which are decisions the province of the executive) and on the other, decisions directed to ensuring a fair trial of an accused and the prevention of abuse of the court's processes (which are the province of the courts) is of fundamental importance. As was said in *Maxwell v The Queen*:
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> > It ought now be accepted, in our view, that certain decisions involved in the prosecution process are, of their nature, insusceptible of judicial review. They include decisions whether or not to prosecute, to enter a nolle prosequi, to proceed ex officio, whether or not to present evidence and, which is usually an aspect of one or other of those decisions, decisions as to the particular charge to be laid or prosecuted. The integrity of the judicial process — particularly, its independence and impartiality and the public perception thereof — would be compromised if the courts were to decide or were to be in any way concerned with decisions as to who is to be prosecuted and for what.[17]

[14] Ibid 514; cf Toohey J, 522–4.

[15] Ibid 535.

[16] (1998) 194 CLR 566.

[17] Ibid 579-80 (citations omitted). See also *Barton v The Queen* (1980) 147 CLR 75, 94–5; *Jago v District Court (NSW)* (1989) 168 CLR 23, 38–39, 54 (Brennan J), 77–78 (Gaudron J); *Williams v*

15 It was recognised in *Brown* that it is impossible to define the circumstances in which a decision to prosecute for a lesser offence might constitute an abuse of the process of the Court.[18] As the issue of the fundamental illogicality between the elements of charge 6 and the element of negligence in charges 9 and 10 was not explored on the appeal, it is inappropriate to finally resolve the question of whether it constituted an abuse of process. It suffices to say that the sentencing judge should not have been placed in the position of having to sentence the applicant on that combination of charges.

16 The Crown should have appreciated that charges 9 and 10 were unnecessary in view of the fact that the applicant had opened the account as charge 6 established. The fact that the applicant withdrew funds from the false account which he had created was an aggravating feature of that charge of obtaining a financial advantage by deception. The removal of charges 9 and 10 would have avoided the need for the judge to address the inconsistent proposition that the applicant was only negligent as to whether the funds he obtained from that account were the proceeds of crime. Alternatively charges 9 and 10 could have been withdrawn and a new indictment filed over alleging knowledge that the funds were the proceeds of crime.

17 Next we turn to the facts upon which the judge was asked to sentence. As we have said, subject to the rare exception of abuse of process, a judge must pass sentence for a lesser offence charged even where the facts as they appear to the judge would appear to support a conviction for a more serious offence. In the present matter, although the facts able to be proved by the prosecution established that the applicant knew that each of the accounts from which he withdrew funds was false, the Director accepted a plea on the basis that the applicant was only negligent as to whether the funds he withdrew were the proceeds of crime. As the authorities already referred to demonstrate, it is entirely a matter for the Director whether a plea to the lesser offence was appropriate given the facts disclosed by the available

Spautz (1992) 174 CLR 509, 548 (Deane J); *Ridgeway v The Queen* (1995) 184 CLR 19, 74–75 (Gaudron J).

18 (1989) 44 A Crim R 385, 481.

evidence. Such a decision having been made, however, the sentencing judge should not have had facts placed before her which disclosed that the offender had committed a more serious offence.

18 It is well settled that a judge may take a different view of the facts to the way they are presented on the plea.[19] Those facts may aggravate or mitigate the seriousness of the offence charged. But the judge may not sentence the offender for conduct which would constitute a more serious offence than that charged. A judge must pass sentence for the lesser offence charged even where the facts as they appear to the judge would support a conviction for a more serious offence. Subject to the rare exception where an abuse of process arises, discussed in the passages quoted above, the judge may not refuse to sentence on the charged offences. Here the judge was, in effect, invited to sentence on a view of the facts which would result in punishment for conduct which should have been the subject of a discrete more serious charge. There was thus a conflict between the agreed facts placed before her Honour and the charged NDPC offences. That issue had to be addressed in order to avoid the likelihood of injustice and appealable error.

19 Neither the defence nor the prosecution drew to the judge's attention that the facts advanced from the bar table disclosed a more serious offence than that pleaded to. Neither suggested that the applicant could not be sentenced on that basis. This case illustrates quite graphically why it is incumbent upon the parties to ensure — where a negotiated outcome results in a plea to a less serious offence than could be established by the facts available to the prosecution — that the settled facts presented to the sentencing judge conform with the agreed charges.

20 In any event, since the parties failed to do so, the sentencing judge should have drawn attention to the irreconcilable difference between the facts upon which she was being asked to sentence and the eight NDPC charges. The preferable course would have been to ask the parties to resolve that inconsistency. The judge was not

[19] See, eg, *DPP v Perry* [2016] VSCA 152 [124]–[133].

to know what the negotiated outcome had resolved.

21 One course of action available to the parties was to file over a new indictment, by agreement, substituting new charges that the applicant knowingly dealt with proceeds of crime contrary to s 194(2) of the *Crimes Act 1958* ('the Act'). Another course was to leave the indictment in its present form (save for charges 6, 9 and 10) and, by consent, withdraw from the judge's consideration that the applicant knew the funds the subject of charges 11 through 15 were the proceeds of crime. The latter course received implicit approval in *Moore v Haynes*.[20] There the Northern Territory Court of Appeal, drawing on *Brown* and *De Simoni*, suggested that, where a sentencing judge is presented with an aggravating circumstance, alleged as part of the agreed facts and which would render the conduct a more serious offence, the proper course is simply to ignore that allegation.[21]

22 It was necessary that the negotiated outcome, following the plea bargain, result in charges and agreed facts that permitted the sentencing judge to sentence in accordance with the law. The plea bargain, and the manner in which the plea was conducted, did not do so. The judge then fell into error by acting upon the facts as presented and sentencing upon the charges as they appeared in the indictment.

[20] (2008) 23 NTLR 112.

[21] Ibid 118 [24].

CROUCHER AJA:

Overview

23 On 26 July 2016, the applicant pleaded guilty in the County Court to 19 offences charged on the one indictment. The charges alleged seven offences of OFAD,[22] one of attempting to obtain a financial advantage by deception ('A-OFAD'),[23] eight of NDPC,[24] one of trafficking a drug of dependence (namely, methylamphetamine),[25] one of possessing a drug of dependence (namely, testosterone)[26] and one of attempting to obtain property by deception ('A-OPD').[27] On 21 September 2016, the judge heard an opening, a plea in mitigation and submissions on sentence.

24 On 28 September 2016, after imposing individual sentences and orders for cumulation, the judge fixed a total effective sentence of five years' imprisonment with a non-parole period of two years and six months.[28]

25 The applicant applies to this Court for leave to appeal against sentence. He relies on three grounds of appeal. Grounds 1 and 2 complain that the total effective sentence and the non-parole period are in breach of totality and manifestly excessive. Ground 3, which was added by leave granted at the hearing of the application, complains that the individual sentences for the NDPC offences and the trafficking offence are manifestly excessive. As the argument developed, it became apparent that the complaint in ground 3 also included a submission that, in breach of the principles discussed in cases such as *R v Newman*,[29] the applicant was sentenced on the offences of NDPC as if they involved an element of knowledge, dishonesty and deception, as

22 Contrary to s 82(1) of the *Crimes Act 1958* ('the Act').

23 Contrary to ss 82(1) and 321M of the Act.

24 Contrary to s 194(4) of the Act.

25 Contrary to s 71AC(1) of the *Drugs, Poisons and Controlled Substances Act 1981* ('DPCS Act').

26 Contrary to s 73(1) of the DPCS Act.

27 Contrary to ss 81(1) and 321M of the Act.

28 See below at [70].

29 [1997] 1 VR 146 ('*Newman*'). See also *De Simoni* (1981) 147 CLR 383.

opposed merely to negligence.

26 I would uphold ground 3 in so far as it concerns the sentences for the NDPC offences, grant leave to appeal, allow the appeal and set aside those sentences and all orders for cumulation. I would resentence the applicant in a manner that results in a total effective sentence of four years and two months' imprisonment with a non-parole period of two years and two months.[30] In those circumstances, I consider it unnecessary to determine grounds 1 and 2. My reasons for those conclusions and proposed orders follow.

Summary of offending, arrest and investigation

Introduction

27 Before turning to the sentences imposed and the submissions of the parties, I shall summarise the applicant's offending and some aspects of the police investigation. This summary is taken largely from the judge's reasons for sentence.[31]

The applicant

28 The applicant was born in Burma on 17 January 1982. He is now aged 35. In 2003, he came to Australia on a student visa. He studied at a TAFE college for an advanced diploma in computer systems engineering. While living in a share house, he met his future wife, who is also of Burmese origin. In 2004, the applicant was deported for failing to meet the threshold level of attendance at classes. He then returned to Australia in 2005 on a spousal visa. He worked with various organisations in the information technology industry until 2014, when he lost his last job because of tardiness as a result of being in the grips of an methylamphetamine (or 'ice') addiction, which commenced in 2013.

30 See below at [Error: Reference source not found].

31 *DPP v Pun* [2016] VCC 1458 [9]–[47] ('Reasons').

29 At the time of the offending, in 2015, the applicant was aged 33. He was self-employed, operating an information technology business from his home in Keysborough, where he lived with his wife. He was using ice daily, gambling too much and incurred a large debt with his drug dealer. That is the background against which he committed the offences on the indictment.

Overview of the offending concerning Westpac Bank

30 The principal victim of the applicant's offending was the Westpac Bank. Over a period of about five months, from 3 February to 8 July 2015, the applicant accessed Westpac's online banking services, from internet provider addresses linked to his home address, to apply for a series of loans and credit card facilities using false names. He opened accounts in seven false names (charges 1–3 and 5–8) and twice unsuccessfully tried to do so using an eighth (charge 4). Once he had applied for a loan account or credit card facility, the applicant would attend a branch of Westpac and supply false identification documents in support of the bank's identity check requirements. Westpac would then authorise the loan or credit facility.

31 Subsequently, on several occasions, the applicant attended Westpac branches and withdrew or, in one instance, transferred funds from accounts that he or another had set up in false names (charges 9–15). He was captured doing so on CCTV cameras.

32 The total value of the financial advantage obtained by setting up the loan or credit facilities was $240,800 (charges 1–3 and 5–8). The total value of the financial advantage the applicant attempted to obtain in this way was $57,400 (charge 4). The total value of the cash withdrawals and transfers was $108,500 (charges 9–15). A further $2,600 in cash was found at the applicant's home address (charge 17).

Individual offences concerning Westpac

33 I turn now to a summary of the individual offences concerning Westpac.

34 *Charge 1: OFAD as 'Kway Han'*: On 3 February 2015, the applicant completed an online application to Westpac for a loan (called a 'Flexi Loan') in the sum of $28,900 using the false name of Kway Han. In order to complete the crime, he then attended the Westpac branch at the Chadstone Shopping Centre and produced a forged marine licence bearing his photograph, as well as a birth certificate, each in the name of Kway Han.

35 *Charge 2: OFAD as 'Samantha Jade'*: On 8 April 2015, the applicant applied online for a Mastercard with a credit limit of $30,000 in the false name of Samantha Jade. An unknown person (not the applicant) attended the Westpac branch in Collins Street in Melbourne and produced a forged marine licence and a utility notice, each in the name of Samantha Jade.

36 *Charge 3: OFAD as 'Gregory Clarke'*: On 9 April 2015, the applicant completed an online application for a Mastercard with a credit limit of $15,000 in the false name of Gregory Clarke. He then attended the Westpac branch in Glenhuntly and produced a forged marine licence bearing his photograph and the name Gregory Clarke.

37 *Charge 4: A-OFAD as 'Ryan Reef'*: This is a rolled up charge comprising two instances of attempting, but failing, to obtain a financial advantage by deception. On 21 April 2015, the applicant applied online for a Mastercard account with a credit limit of $40,000 and a Flexi Loan in the amount of $17,400, each in the false name of Ryan Reef. On 27 April 2015, he attended the Westpac branch at Braeside and produced a forged heavy vehicle licence bearing his photograph and a false utility notice, each in the name of Ryan Reef. This attendance was recorded on CCTV footage. Both applications were declined.

38 *Charge 5: OFAD as 'Sam Harris'*: This too is a rolled up charge, but comprising two instances of successfully obtaining a financial advantage. On 28 April 2015, the applicant completed an online application for a Mastercard with a limit of $30,000 in the false name of Sam Harris. On 30 April 2015, he completed an online application for a Flexi Loan in the amount of $27,900 in the same name. On 27 April 2015, the

applicant had attended a Westpac branch on the corner of Swanston and Collins Streets in Melbourne and produced a heavy vehicle licence bearing his photograph and a utility notice, each in the name of Sam Harris, in order to facilitate these Mastercard and Flexi Loan applications.

39 *Charge 6: OFAD using name 'Phuong Trinh'*: Again, this is a rolled up charge concerning two instances of offending. On 1 June 2015, the applicant completed an online application for a Mastercard with a credit limit of $30,000 in the false name of Phuong Trinh. Curiously, he provided his own mobile phone number as a contact detail. On 4 June 2015, the applicant attended the Westpac branch at Ferntree Gully and provided a forged licence and a Medicare Card in the name of Phuong Trinh in order to activate this card. On 19 June 2015, he applied online for a Flexi Loan in the same name in the amount of $24,000.

40 *Charge 7: OFAD as 'Chun Zhou':* On 17 May 2015, the applicant applied online for a Mastercard with a credit limit of $25,000 in the name of Chun Zhou. On 4 June 2015, he attended the Westpac branch at Knox Shopping Centre and produced a false driver's licence and an Energy Australia bill in the name of Chun Zhou in support of the application.

41 *Charge 8: OFAD as 'Mikito Nishino':* On 17 May 2015, the applicant applied online for a Mastercard with a credit limit of $30,000 in the name of Mikito Nishino. On 4 June 2015, he attended the Westpac branch at QV Village and provided a forged driver's licence and a utility notice in the same name in support of the application.

42 *Charges 9 & 10: NDPC from 'Phuong Trinh' account*: These offences relate to the offence in charge 6, as they concerned withdrawals from one of the Phuong Trinh accounts created by the applicant. On 29 June 2015, the applicant attended the Westpac branch in Bayswater and withdrew $8,000 in cash from the Mastercard account in the name of Phuong Trinh (charge 9). On the same date, he attended the Westpac branch at Glen Waverley and withdrew $15,000 in cash from the same account (charge 10). Each attendance was captured on a CCTV camera.

43 *Charges 11, 14 & 15: NDPC from 'Myo Aung' account*: On 1 July 2015, the applicant attended the Westpac branch at QV Village and withdrew $30,000 in cash from an account in the name of Myo Aung (charge 11). On 6 July 2015, he attended a Westpac branch in Springvale and withdrew $10,000 in cash from the same account (charge 14). The same day, he attended another Westpac branch in Springvale and transferred $20,000 from the Myo Aung account to the Mikito Nishino account (charge 15). Again, each attendance was captured on a CCTV camera.

44 There is no related charge that the applicant falsely created the Myo Aung account. It was, however, accepted on the plea that he believed it to be a fraudulent account.

45 *Charges 12 & 13: NDPC from 'Vincent Chou' account*: On 2 July 2015, the applicant attended the Westpac branch in Clayton and withdrew $500 from an account in the name of Vincent Chou (charge 12). On 4 July 2015, he attended the Westpac branch on the corner of Swanston and Collins Streets and withdrew $25,000 from the same account (charge 13). Each attendance was captured on a CCTV camera.

46 Again, there is no related charge that the applicant falsely created that account. Again, however, it was accepted on the plea that he believed that the account was set up fraudulently.

Detection and first arrest

47 At about 4:00 pm on 7 July 2015, the applicant attended the Westpac branch at Dandenong. He produced a card in the name of Phuong Trinh and told the teller that the Knox branch of the bank had blocked his card. The teller noticed that there were some funds available in the account but that the system indicated that there was no money available for withdrawal. She asked that the applicant return the following day.

48 The next day, when the applicant returned, he produced the same card, as well as a driver's licence in the name of Phuong Trinh. The teller contacted the Westpac Fraud Investigation Unit, who in turn contacted police, who attended the bank

shortly afterwards and arrested the applicant. He had in his possession a heavy vehicle licence, a Medicare card and two Westpac cards, all in the name of Phuong Trinh. Police discovered that the VicRoads system recorded no heavy vehicle licence in the name of Phuong Trinh. The applicant was taken to Springvale Police Station to confirm his identity. Police then obtained a warrant to search his home and his wife's BMW sedan, which he had driven to the bank.

Charges 16 & 18: Drug offences

49 Later that day (ie 8 July 2015), inside the BMW, police found a quantity of methylamphetamine, including in some snap-lock bags, a set of silver scales, 30 SIM cards and a mobile phone. An example of one of the texts found on the phone reads: 'Hey I got 400 can I please get half just got his brother and sister who hanging out for it'. The total amount of methylamphetamine found was about 30 grams (charge 16). Also in the BMW was a vial of testosterone (charge 18).

50 At the applicant's home, police found on his computer hard drive a multitude of false documents, including licences, payslips and utility accounts used to apply for credit facilities and loans in the false identities the subject of the charges.

Charge 17: NDPC – Cash seized

51 Police also found $2,600 in cash during the search of the applicant's home. This offence does not appear to be linked to any of the false accounts or withdrawals the subject of other charges; but, rather, simply concerns the possession of unexplained monies.

Applicant charged and released on bail the next day

52 Later that day, police charged the applicant with various offences. He spent the night in custody and was released on bail the next day (ie 9 July 2015) when he attended a filing hearing in the Magistrates' Court.

Charge 19: A-OPD – Marine licence at VicRoads

53 On 5 August 2015, while on bail, the applicant attended VicRoads at Heatherton and applied for a duplicate marine licence in the name of Kway Han. That request was rejected as the marine licence had been cancelled.

Second arrest

54 On 14 August 2015, the applicant was arrested on suspicion of the attempted offence in charge 19. He was remanded in custody, where he has remained ever since.

'Can say' statement

55 On 11 October 2015, a 'can say' statement was prepared and witnessed by the applicant's then-solicitor. In the statement, the applicant said that he agreed to make the Kway Han loan application, that he paid $5,000 for a forged birth certificate used in support of that loan and that he withdrew money from unspecified false accounts. He said that, save for the Kway Han application, he had never made any online credit applications and never picked up a card from the bank, except when a card was blocked. He admitted withdrawing funds from the bank to support an ice addiction. He nominated a number of individuals as being involved in a joint criminal enterprise to defraud the bank, and that they were led by a person he knew as 'Andrew Harris', also known as 'Andrew Haddara'. He said that Mr Harris would give him ice and then make the false loan applications to enable him to pay the debts he owed to Mr Harris. He said that other people would pick up the cards from the bank and give them to Mr Harris, who would then give them to Mr Han, and then he (the applicant) would withdraw the funds and pay his debt to Mr Harris.

56 While the prosecution acknowledged that Mr Haddara is a real person, investigators could not establish any link between him and the applicant. Nor could police identify the other persons the applicant nominated.

57 The judge concluded that the 'can say' statement was of 'no real utility to the investigators'.[32]

Settlement and pleas of guilty

58 The parties engaged in extensive negotiations following a contested committal hearing. Once an appropriately drawn indictment was prepared, the applicant entered pleas of guilty.

Judge's reasons for sentence

59 I turn now to some of the key aspects of the judge's reasons for sentence.

60 While the judge accepted that the offending was not aggravated by causing losses to real individual account holders, she nevertheless found the offending to be 'objectively very serious', as it involved 'the creation of false identity documents that [the applicant] then personally used in order to complete the opening of accounts to facilitate the withdrawal of monies to which [he] was not otherwise entitled'.[33] Her Honour also considered that those factors showed that the applicant's role in the offending was important. Further, as his counsel conceded on the plea, the applicant had received 'some financial benefit', which was comprised of the $88,500 in cash he withdrew and the $20,000 he transferred from the account of 'Myo Aung' to the account of 'Mikito Nishino'.

61 While the judge accepted that the applicant became involved in the offending because he had accrued large debts to his drug dealer, she considered that that 'in no way excuse[d] [the] offending'.[34]

62 The judge also accepted that the offence in charge 19 was aggravated by the fact that it was committed while on bail. This also required her Honour to have regard to the

32 Ibid [48].

33 Ibid [60].

34 Ibid.

operation of s 16(3C) of the *Sentencing Act 1991*, which requires that the sentence for that offence be served cumulatively unless otherwise ordered.

63 Counsel urged several factors in mitigation. Those the judge accepted included the following. First, at the age of 33, the applicant had no prior convictions and was a person of otherwise good character.

64 Secondly, his pleas of guilty, while not entered at the earliest stage, were regarded as early pleas which facilitated the course of justice, saved court time and expense, had real utility, evidenced an acceptance of responsibility and demonstrated remorse.

65 Thirdly, the judge accepted that the applicant was remorseful for his actions.

66 Fourthly, her Honour found that the applicant had 'excellent' prospects of rehabilitation.[35] He had obtained formal qualifications in information technology ('IT') and had worked hard in that industry between 2006 and 2014 (although he was sacked eventually because of poor attendance and performance as a result of his ice addiction). While in custody, he had shown exemplary behaviour and had been drug-free, productive and completed drug and other rehabilitative programs. He also enjoyed the continuing support of his wife and wider family; had a desire to return to his professional career in the IT industry; had no intellectual or psychological impediment to rehabilitation; and had demonstrated insight into his offending behaviour, the effect of drugs on him and what he needed to do to rehabilitate himself and remain crime-free.

67 Fifthly, the judge accepted that the applicant had spent much of his time in custody in harsher conditions than usual because of the restrictions following the prison riots that had occurred shortly before his remand.

68 The judge determined that she must give 'real effect to general deterrence and denunciation' in sentencing the applicant.[36] General deterrence had to be

[35] Ibid [64].

[36] Ibid [91].

emphasised, her Honour said, because criminal activity of the type in which the applicant engaged is difficult to detect, consumes resources in its investigation, undermines trust in the banking system, and has harmful effects in that the costs to the bank are likely to be passed on to its customers. She accepted that, because of the applicant's previous good character, specific deterrence was of 'lesser importance' in this case.[37]

69 Counsel for the applicant had submitted that this was an appropriate case in which to impose a prison sentence combined with a community correction order. The judge rejected that submission on the basis that the offending was too serious to warrant such a disposition. Her Honour did, however, say that she would fix a non-parole period 'shorter than otherwise because of [the applicant's] efforts towards rehabilitation whilst [he has] been on remand in very onerous circumstances'.[38]

Sentences imposed

70 The judge imposed individual sentences and orders for cumulation as set out in the below table:

Charge	Offence	Maximum prison term	Prison term imposed	Cumulation
1	OFAD: 'K Han'; $28,900 loan	10 years	1 year	3 months
2	OFAD: 'S Jade'; $30,000 card	10 years	1 year	3 months
3	OFAD: 'G Clarke'; $15,000 card	10 years	1 year	3 months
4	A-OFAD: 'R Reef'; $57,400 card/loan	5 years	9 months	1 month
5	OFAD: 'S Harris'; $57,900 card/loan	10 years	18 months	6 months
6	OFAD: 'P Trinh'; $54,000 card/loan	10 years	18 months	6 months
7	OFAD: 'C Zhou; $24,000 card	10 years	1 year	3 months
8	OFAD: 'M Nishino'; $30,000 card	10 years	1 year	3 months
9	NDPC: 'P Trinh'; $8,000 cash	5 years	1 year	1 month
10	NDPC: 'P Trinh'; $15,000 cash	5 years	1 year	1 month
11	NDPC: 'M Aung'; $30,000 cash	5 years	18 months	Base
12	NDPC: 'V Chow'; $500 cash	5 years	3 months	None
13	NDPC: 'V Chow'; $25,000 cash	5 years	1 year	3 months
14	NDPC: 'M Aung'; $10,000 cash	5 years	6 months	1 month
15	NDPC: 'M Aung'; $20,000 cash	5 years	15 months	3 months
16	Trafficking methylamphetamine	15 years	1 year	3 months
17	NDPC: $2,600 cash	5 years	6 months	None
18	Possessing testosterone	12 months[39]	$500 fine	N/A

[37] Ibid [63].

[38] Ibid [95].

19	A-OPD: 'K Han'; marine licence	5 years	1 year	2 months

71 As indicated earlier, those orders resulted in a total effective sentence of five years' imprisonment, in respect of which the judge fixed a non-parole period of two years and six months.

72 The judge also declared, pursuant to s 6AAA of the *Sentencing Act*, that but for the applicant's pleas of guilty she would have fixed a total effective sentence of seven years' imprisonment with a non-parole period of five years.

[39] Since it was conceded by the prosecutor and accepted by the judge that the testosterone was possessed for personal use, the maximum penalty was 12 months' imprisonment: see s 73(1)(b) of the DPCS Act.

Ground 3 (Part 1): Individual sentences for NDPC offences (Charges 9–15, 17)

> **Ground 3: The sentences imposed on the offences in Charges [9–15 and 17] are manifestly excessive.**

73 I turn now to the grounds of appeal, starting with the first part of ground 3.

74 In my view, the sentences imposed on the offences of NDPC are afflicted with error and are manifestly excessive in any event. The steps in my reasoning are as follows.

75 First, the individual sentences, with some exceptions, tend to vary in length roughly according to the amount of cash that was withdrawn or transferred. Thus, charges 9 and 10, which concerned withdrawals of $8,000 and $15,000, each attracted a sentence of 12 months' imprisonment, and charges 11 ($30,000) and 15 ($20,000) attracted sentences of 18 and 15 months' imprisonment respectively. On the other hand, charges 13 ($25,000) and 14 ($10,000) do not quite fit that precise pattern, as they attracted sentences of 12 and six months' imprisonment respectively.

76 Secondly, these sentences tend to be similar to or heavier than those imposed for the offences of OFAD involving financial advantages obtained similar to or larger than the cash amounts withdrawn in the NDPC offences. Thus, charges 5 and 6, which are both rolled up charges concerning financial advantages of over $50,000, attracted a sentence, in each case, of 18 months' imprisonment, which is the same as the sentence for the NDPC offence in charge 11 ($30,000). And charges 1, 2 and 3, which concerned financial advantages ranging from $15,000 to $30,000, attracted sentences of 12 months' imprisonment, which is the same as the sentence for the NDPC offence in each of charges 9 and 10 ($8,000 and $15,000).

77 Thirdly, while the NDPC offences concerned the receipt or transfer of cash or funds, the OFAD offences concerned only the obtaining of financial advantage by way of a credit facility, rather than by causing cash or funds to be received or transferred. While this difference may help explain the relativity among the sentences imposed, I do not think it does so adequately. Nor, for reasons that follow, should this

difference be given too much prominence in sentencing in the present case.

78 Thus, fourthly, the offences of OFAD each carry a maximum penalty of 10 years' imprisonment, whereas the offences of NDPC each carry a maximum penalty of only five years' imprisonment.

79 Fifthly, the offences of OFAD involve elements of deception and dishonesty, whereas the offences of NDPC do not. The offence of OFAD is found in s 82(1) of the Act, which provides that '[a] person who by any deception dishonestly obtains for himself or another any financial advantage' is guilty of an offence. Section 194(4) of the Act, on the other hand, makes it an offence to 'deal with proceeds of crime being negligent as to whether or not it is proceeds of crime'. This is the provision under which the applicant was charged with the NDPC offences. Pursuant to s 193(1), to 'deal with' includes to receive, possess, conceal or dispose of; and 'proceeds of crime' means property derived or realised, directly or indirectly, by any person from the commission of an offence, including an offence of OFAD. Section 194 creates a cascading series of related offences, ranging from dealing with proceeds of crime *knowingly* and with an *intention to conceal* that it is proceeds of crime (s 194(1)); to dealing with proceeds of crime *knowingly* (s 194(2)); to doing so *recklessly* (s 194(3)); and to doing so *negligently*, as in the applicant's case. Each offence carries a different maximum penalty (20, 15, 10 and five years' imprisonment respectively).[40]

80 Sixthly, charges 9 and 10 concerned the applicant's withdrawal of funds from an account that he dishonestly and by deception created — namely, that of 'Phuong Trinh' (charge 6). And while charges 11 to 15 concerned his withdrawals from accounts that the applicant did not create, it was accepted by his counsel on the plea that he believed that those accounts had been created fraudulently. Thus, there can be no dispute that, despite the nature of the charges he faced, the applicant knowingly, dishonestly and by deception received or transferred the cash or funds the subject of charges 9 to 15.

[40] Section 195 of the Act also provides for a summary offence of dealing with property 'if there are reasonable grounds to suspect that the property is the proceeds of crime'. The offence carries a maximum penalty of two years' imprisonment.

81 Seventhly, despite the fact that neither knowledge nor dishonesty nor deception — but only negligence — as to the fact that what has been dealt with is proceeds of crime is an element of the NDPC offences to which the applicant pleaded guilty, in view of the severity of the sentences imposed on him for those offences (both in absolute terms and when compared with the sentences on the OFAD offences) and the concessions by his counsel on the plea, I find it impossible to escape the conclusion that he has been sentenced as if he knew that the funds withdrawn were proceeds of crime and that he took those funds dishonestly and by deception.

82 Eighthly, all indications at the plea and in the sentencing remarks support this conclusion. On the plea, counsel for the applicant submitted that, because the NDPC offences in charges 9 and 10 concerned withdrawals from an account created by the applicant and in respect of which he was charged in charge 6, the judge must be 'careful to bear in mind that, essentially, the benefit gained through the deception charge is, if you like, the same funds that are dealt with in respect of Charges 9 and 10'. The other withdrawals charged, counsel pointed out, were not from any such account. The prosecutor later indicated that he agreed that the judge must be careful to 'avoid double punishment'.

83 Further, in her sentencing remarks, the judge said that 'this was serious offending involving a series of dishonest acts and obtaining monies as a consequence'.[41] She also noted defence counsel's acceptance that the applicant was 'a knowing participant in the frauds committed upon the Westpac Bank'.

84 To my mind, these discussions and reasons only add force to the conclusion that all proceeded without regard to the need to ensure that, despite his admissions as to a much more culpable state of mind, the applicant must not be sentenced on the NDPC offences on any basis other than that he was negligent as to the cash or funds being the proceeds of crime. Instead, it seems plain that it was assumed that he must be sentenced on those offences as if he knew the funds were proceeds of crime and that he took those funds dishonestly and by deception.

[41] Reasons [91].

85 Ninthly, in my opinion, to sentence on the NDPC offences in that way offends the principle that a person is to be sentenced only for the offence of which he has been convicted, and not for a more serious offence of which he has not been convicted.[42] In particular, it is as if the applicant has been sentenced on the NDPC offences for offences of knowingly dealing with proceeds of crime or dishonestly obtaining property by deception, or both, each of which is a more serious category of offence.

86 Tenthly, it may well seem artificial — even wrong — that the applicant is not to be sentenced in accordance with what surely was not merely negligence on his part but a substantially more culpable state of mind when he received or transferred those funds. But as Winneke P said in *Newman*:

> Whilst I have every sympathy with the learned sentencing judge having regard to the difficult circumstances with which he was confronted in his sentencing task, I am none the less persuaded that he has fallen into error by including within his sentence a component for the aggravated assault on the inhabitant of the house who was the target of the relevant intention which the applicants harboured when they effectuated their unlawful entry.
>
> The common law principle that a person cannot be sentenced for an offence with which he has neither been charged nor convicted is a venerable one, but it is one which has created a tension with another equally venerable principle of sentencing; namely, that a sentencing judge is entitled, and indeed bound, to take into account all the circumstances which are relevant to the commission of the offence with which the prisoner has been charged. The latter principle however must, in the appropriate circumstances, give way to the former because it could never be consistent with fairness and justice to sentence a person for an offence with which he has not been charged or convicted:
>
> > [T]he general principle that a sentence imposed on an offender should take account of all the circumstances of the offence is subject to a more fundamental and important principle, that no one should be punished for an offence of which he has not been convicted … The combined effect of the two principles, so far as is relevant for present purposes, is that a judge, in imposing sentence, is entitled to consider all of the conduct of the accused, including that which would aggravate the offence, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence.[43]
>
> …

[42] See, eg, *Newman* [1997] 1 VR 146 (Winneke P, Hayne JA and Crockett AJA agreeing); *De Simoni* (1981) 147 CLR 383.

[43] *De Simoni* (1981) 147 CLR 383, 389 (Gibbs CJ).

> Although it has been said that the application of the principle sometimes requires a judge to adopt an artificial and, at times, quite unrealistic view of the facts (cf *R v Wyllie* [1982] VR 21 at 32), it seems to me that, in a case like the present, the matter is very much in the hands of the Crown. If it desires the judge to have the flexibility, in imposing sentence, of dealing with the offender for aggravating circumstances which in themselves amount to a discrete and serious offence, then it is within the Crown's capacity to shape its presentment accordingly.[44]

87 In my opinion, the same remarks are applicable in the present case. The Director could have laid, but chose not to lay, charges of knowingly dealing with proceeds of crime or obtaining property by deception to reflect more fully the aggravating circumstances or the separate criminality involved in withdrawing funds from the accounts — namely, that the applicant knew that those funds were proceeds of crime and that he had no claim of right over them and was deceiving the bank in taking them. Since, instead, the charges alleged only instances of NDPC, the judge was — and this Court is — placed in the invidious position of being prevented from taking into account the full extent of the applicant's admitted criminality when sentencing for the withdrawal or transfer of funds.

88 Eleventh, that said, it is perhaps arguable that it was unnecessary to lay charges 9 and 10 in order to capture the additional criminality in withdrawing the funds the subject of those charges. Instead, it is arguable that those withdrawals could be regarded as aggravating factors capable of being taken into account when assessing the seriousness of the offence of OFAD in charge 6. However, for four reasons, I consider it unnecessary and inappropriate to determine this issue in this particular case. First, this issue was not the subject of argument on the application. Secondly, in my view, the sentence on charge 6 (18 months' imprisonment) is already of sufficient length to allow for such aggravation. Thirdly, as the parties accepted on the plea, there is an element of overlap between the offences in charges 9 and 10 on the one hand and charge 6 on the other. Thus, as will be seen, I think that the better view, and one which accords with totality as well, is that, on a resentencing, the sentences on the offences in charges 9 and 10 should be directed to be served concurrently with the other sentences. Fourthly, there is no equivalent of charge 6

[44] *Newman* [1997] 1 VR 146, 150–1.

when it comes to consideration of the NDPC offences in charges 11 to 15.

89 Finally, that the principle at issue has been breached is an error that, by itself, would reopen the sentencing discretion. Indeed, that was the outcome in *Newman* itself. However, it may also provide an explanation as to why it is that the individual sentences on the NDPC offences are manifestly excessive. In any event, in my view, when regard is had to the maximum penalty for these offences, the amounts of money withdrawn or transferred, the sentences imposed for the offences of OFAD, the fact that the applicant could be sentenced only for being negligent (rather than knowing, reckless, dishonest or deceptive) as to whether or not the funds were proceeds of crime, the various mitigating factors and the relevant sentencing purposes, it is apparent that the individual sentences on the offences of NDPC are manifestly excessive. Either way, there is error in the sentences imposed.

90 I am also of the view that substantially lesser sentences must be passed for these offences and that the total effective sentence must be reduced.

91 Accordingly, I would uphold this part of ground 3, grant leave to appeal, allow the appeal, set aside the sentences on the NDPC offences and the orders for cumulation and resentence the applicant.[45] I shall come to the issue of resentencing shortly.

Ground 3 (Part 2): Sentence for trafficking methylamphetamine (Charge 16)

> **Ground 3: The [sentence] imposed on the [offence] in [Charge 16 is] manifestly excessive.**

92 For the moment, however, I shall turn to the second part of ground 3, which is the complaint that the sentence for the offence of trafficking in methylamphetamine or 'ice' (charge 16) is also manifestly excessive.

93 While the offence, as particularised in the indictment and as opened on the plea, appeared to allege trafficking on only the one day based on possession of about 30

[45] See *Criminal Procedure Act 2009* ss 280, 281 & 282.

grams of ice for the purposes of sale,[46] there were some other features attending the offence that placed it in a more serious context. As I indicated earlier, police found scales, snap-lock bags containing ice and numerous SIM cards, as well as text messages on the applicant's phone which related to selling drugs. Counsel accepted at the plea that the applicant was on-selling drugs, but only to users and only to fund his own habit. Given that concession, it could not be said in mitigation to be an isolated instance of trafficking. Further, a preparedness to sell even to end users has the potential to add to the misery that the drug ice has brought to the community. It is the type of crime that begets yet more crime, as those who struggle to pay for the drug sometimes commit offences to feed their ruinous habits, which the applicant's own circumstances prove. It must be remembered too that the offence carries a maximum penalty of 15 years' imprisonment.

94 On the other hand, it is fair to say that the offence would have been dealt with in the Magistrates' Court had it not been bound up with the applicant's arrest on the offences concerning Westpac. It is also reasonable to assume that, as a first offender who had pleaded guilty and shown remorse and who had excellent prospects of rehabilitation but had spent his time on remand in harsh conditions, a shorter prison sentence or a sentence other than imprisonment might have been imposed.

95 But that is not the question. Rather, the question is whether, in all the circumstances, the sentence imposed was reasonably open to the judge in the exercise of sound discretionary judgment. In my view, while the sentence may be regarded as firm, and while I accept that a lesser prison sentence or even a non-custodial sentence might have been imposed, for the reasons I have given, a sentence of 12 months' imprisonment was open in all the circumstances.

96 Thus, I would not uphold this part of ground 3.

Grounds 1 & 2: Total effective sentence and non-parole period

[46] See the definition of 'traffick' in s 70(1) DPCS Act, which includes to 'have [a drug of dependence] in possession for sale'.

Ground 1: The total effective sentence and the non-parole period imposed upon the applicant offend the totality principle.

Ground 2: The total effective sentence and the non-parole period imposed upon the applicant are manifestly excessive.

97 I indicated earlier that, in view of my conclusions about the first part of ground 3, I consider it unnecessary to consider these grounds.

98 That said, while I offer no view on whether it is manifestly excessive or in breach of totality, as will be apparent from my proposed resentencing, I consider the total effective sentence at least to be rather firm, particularly for a first offender who pleaded guilty, is remorseful, has such strong prospects of rehabilitation and who spent a good deal of time in harsh conditions on remand.

Resentencing

99 I propose that the applicant be resentenced in the manner indicated in the table below. I note the following matters of significance.

100 First, I have proposed that the prison sentence for each offence of NDPC be reduced substantially. These shorter sentences reflect, among other things, the maximum penalty of five years' imprisonment; the amount of money withdrawn or transferred and the benefit the applicant obtained unlawfully thereby; that, despite his true knowledge, the applicant is to be treated as if negligent instead of knowing, dishonest or deceptive; and the importance of the mitigating factors, including his pleas of guilty, remorse, prior good character, excellent prospects of rehabilitation and the hardship of his period on remand. I am of the view that sentences ranging from one to six months' imprisonment also adequately reflect the sentencing purposes of general and specific deterrence, denunciation, just punishment, protection of the community and rehabilitation, all of which are of relevance in this case.

101 Secondly, a question arises as to which sentence should be the base sentence. The sentence for the offence in charge 11 is no longer suitable for selection as the base

sentence, as the offence is not the most serious of the offences of which the applicant was convicted. Further, the offence now carries a substantially shorter sentence in any event. I regard the offences in charges 5 and 6 as the two most serious offences, as each involves a substantial financial advantage (over $50,000) and each is comprised of two offences rolled up into the one charge. Instead of the sentence for the offence in charge 5, however, I would choose the sentence for the offence in charge 6 as the base sentence, because it has the additional quality that it is associated with the withdrawals involved in the offences in charges 9 and 10, the sentences for which I consider should be directed to be served concurrently on account of both the overlap among those three offences and the principle of totality.

102 Thirdly, in my view, that the sentence on the offence in charge 11 was made the base sentence previously was a principal factor contributing to an over-representation of the NDPC offences in the total effective sentence. In total, the sentences on the NDPC offences accounted for 27 months of the 60-month total effective sentence, whereas the OFAD offences, as well as the two attempts, accounted for 30 months. (The trafficking offence accounted for the other three months.) Collectively, the OFAD offences (and the attempts) are substantially more serious than the NDPC offences, in that they involved greater planning, more brazen behaviour, a significantly more culpable state of mind and a much greater total value of financial advantage ($298,200) than the total value of the monies withdrawn or transferred as a result of the NDPC offences ($108,500). It is therefore appropriate that the sentences for the OFAD offences should contribute to the bulk of the total effective sentence.

103 Fourthly, I would confirm all other individual sentences and would reimpose all other orders for cumulation, bar one. I consider it appropriate to direct that four, not six, months of the sentence for the offence in charge 5 be served cumulatively. This still would be the heaviest order for cumulation. The proposed order also reflects my assessment of the need to accommodate the totality principle.

Charge	Offence	Maximum prison term	Prison term imposed	Cumulation

1	OFAD: 'K Han'; $28,900 loan	10 years	1 year	3 months
2	OFAD: 'S Jade'; $30,000 card	10 years	1 year	3 months
3	OFAD: 'G Clarke'; $15,000 card	10 years	1 year	3 months
4	A-OFAD: 'R Reef'; $57,400 card/loan	5 years	9 months	1 month
5	OFAD: 'S Harris'; $57,900 card/loan	10 years	18 months	4 months
6	OFAD: 'P Trinh'; $54,000 card/loan	10 years	18 months	Base
7	OFAD: 'C Zhou; $24,000 card	10 years	1 year	3 months
8	OFAD: 'M Nishino'; $30,000 card	10 years	1 year	3 months
9	NDPC: 'P Trinh'; $8,000 cash	5 years	3 months	None
10	NDPC: 'P Trinh'; $15,000 cash	5 years	4 months	None
11	NDPC: 'M Aung'; $30,000 cash	5 years	6 months	2 months
12	NDPC: 'V Chow'; $500 cash	5 years	1 month	None
13	NDPC: 'V Chow'; $25,000 cash	5 years	6 months	2 months
14	NDPC: 'M Aung'; $10,000 cash	5 years	3 months	1 month
15	NDPC: 'M Aung'; $20,000 cash	5 years	6 months	2 months
16	Trafficking methylamphetamine	15 years	1 year	3 months
17	NDPC: $2,600 cash	5 years	2 months	None
18	Possessing testosterone	12 months[47]	$500 fine	N/A
19	A-OPD: 'K Han'; marine licence	5 years	1 year	2 months

104 These orders would produce a total effective sentence of four years and two months' imprisonment. After standing back to have a 'second look' at the resulting sentence, I am satisfied that the total effective sentence adequately reflects all relevant considerations, including totality.

105 I would fix a non-parole period of two years and two months. In selecting that period, I have sought to give effect to the judge's view, with which I respectfully agree, that this was an appropriate case for the fixing of a relatively short non-parole period. This order also accords with my assessment of the necessary period to be served in custody before eligibility for conditional release on parole.

106 Pursuant to s 6AAA of the *Sentencing Act*, I would declare that, but for the applicant's pleas of guilty, I would have proposed a total effective sentence in the order of six years' imprisonment with a non-parole period in the order of four years.

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[47] See n 39 above.